IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

JOHN WILLIE PARTEE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Hickman County
No. 08-5030C Robbie T. Beal, Judge

No. M2008-01773-CCA-R3-HC - Filed November 20, 2008

This matter is before the Court upon the State's motion to affirm the judgment of the trial court by memorandum opinion pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Petitioner has appealed the trial court's order dismissing the petition for writ of habeas corpus. Upon review of the record in this case, we are persuaded that the trial court was correct in dismissing the petition for writ of habeas corpus and that this case meets the criteria for affirmance pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Accordingly, the State's motion is granted and the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and ROBERT W. WEDEMEYER, JJ., joined.

John Willie Partee, Pro Se, Only, Tennessee.

Robert E. Cooper Jr., Attorney General & Reporter; Elizabeth Bingham Marney, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

A previous opinion of this Court stated the underlying facts as follows:

> [T]he petitioner was convicted of first degree murder and sentenced to ninety-nine years and one day in 1971. While serving his sentence at Brushy Mountain State Prison, the petitioner was convicted in 1983 of the additional offense of assault with intent to commit first degree murder arising from the stabbing of fellow-inmate,

James Earl Ray. He received a sentence of sixty years for this offense to be served consecutively to the ninety-nine year and one day sentence for first degree murder.

John Willie Partee v. James Fortner, Warden, No. M2007-01724-CCA-R3-HC, 2008 WL 1805757, at *1 (Tenn. Crim. App., at Nashville, Apr. 22, 2008).

On April 29, 2008, Petitioner filed his most recent petition for writ of habeas corpus. This petition was based upon his 1983 conviction for assault with intent to commit first degree murder. In his petition, he argued that the trial court's sentence of sixty years for his conviction violates the ex post facto provisions of Article I, § 11 of the Tennessee Constitution and Article I, § 10(1) of the United States Constitution because Tennessee Code Annotated section 39-604 (Supp. 1980) provides for a minimum sentence of three years and a maximum sentence of twenty-one years. On June 25, 2008, the State filed a motion to dismiss based upon the fact that this issue had been previously determined because Petitioner had filed a previous petition for writ of habeas corpus relief based upon the legality of his sentence and the petition had been denied on the merits. On July 15, 2008, the trial court filed an order granting the motion to dismiss and dismissing the petition based upon the principles of res judicata.

Analysis

Petitioner argues on appeal that the trial court erred in dismissing his petition based upon the principles of res judicata. The determination of whether to grant habeas corpus relief is a question of law. *See Hickman v. State*, 153 S.W.3d 16, 19 (Tenn. 2004). As such, we will review the habeas corpus court's findings de novo without a presumption of correctness. *Id.* Moreover, it is the petitioner's burden to demonstrate, by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, section 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. *See Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. *See Taylor*, 995 S.W.2d at 83. "A void judgment 'is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired.' We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal." *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting *Taylor*, 955 S.W.2d at 83).

However, if after a review of the habeas petitioner's filings the habeas corpus court determines that the petitioner would not be entitled to relief, then the petition may be summarily dismissed. T.C.A. § 29-21-109; *State ex rel. Byrd v. Bomar*, 381 S.W.2d 280 (Tenn. 1964). Further,

a habeas corpus court may summarily dismiss a petition for writ of habeas corpus without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. *Passarella v. State*, 891 S.W.2d 619 (Tenn. Crim. App. 1994).

The procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. *Hickman*, 153 S.W.3d at 19-20; *Archer*, 851 S.W.2d at 165. For the benefit of individuals such as Petitioner, our legislature has explicitly laid out the formal requirements for a petition for a writ of habeas corpus at T.C.A. § 29-21-107:

> (a) Application for the writ shall be made by petition, signed either by the party for whose benefit it is intended, or some person on the petitioner's behalf, and verified by affidavit.
>
> (b) The petition shall state:
>
> (1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained, mentioning the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;
>
> (2) The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof shall be annexed, or a satisfactory reason given for its absence;
>
> (3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best of the applicant's knowledge and belief; and
>
> (4) That it is the first application for the writ, or, is a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons be given for the failure so to do.

"A habeas corpus court may properly choose to dismiss a petition for failing to comply with the statutory procedural requirements." *Hickman*, 153 S.W.3d at 21.

Petitioner states in his argument that was convicted under Count 1 of his indictment which he asserts is based upon Tennessee Code Annotated section 39-604(a) (Supp. 1981). Petitioner argues that Tennessee Code Annotated section 39-604(a) provides for a sentence of five to twenty-five years, therefore, he argues, his sentence of sixty years is not provided for under the statute.

Tennessee Code Annotated section 39-604, which has since been repealed, read as follows:

> (a) Whoever shall feloniously and with malice aforethought assault any person, with intent to commit murder in the first degree, or shall administer or attempt to give any poison for that purpose, though death shall no ensue, shall, on conviction, be imprisoned in the state penitentiary for not less than five (5) nor more than twenty-five (25) years.
>
> (b) If bodily injury to the victim occurs as a result of such an assault in violation of subsection (a), the punishment shall be a determinate sentence of confinement in the state penitentiary for life or for a period of not less than five (5) years.
>
> (c) In the case of bodily injury to the victim, the offense defined in subsection (b) of this section is a Class X felony.

T.C.A. § 39-604 (Supp. 1980) (repealed).

It is apparent that Petitioner is attacking the legality of his sentence based upon the statutory provisions. Although Petitioner has failed to attach the prior writs for habeas corpus, he has attached an order dismissing a previous writ filed by the habeas corpus court on October 13, 1998, which states that "[t]he penalty received by the petitioner was legal under the provisions of this statute . . . ." This order was affirmed by our Court by an order pursuant to Rule 20. *John Willie Partee v. Jack Morgan, Warden*, No. 01C01-9812-CC-00499, at *1 (Tenn. Crim. App., at Nashville, May 4, 1999). Based upon the previous habeas corpus court's order, we can only assume that, in his previous petition, Petitioner was attacking the legality of his sentence imposed pursuant to the statute under which he was indicted. Therefore, this issue has been previously addressed by way of a writ of habeas corpus. Once an issue has been decided it may not be relitigated. *See Mario A. Leggs v. Howard Carlton, Warden*, No. E2004-02457-CCA-R3-HC, 2005 WL 1703184, at *2 (Tenn. Crim. App., at Knoxville, Jul. 21, 2005) (stating that issue had previously been addressed in Rule 20 Memorandum Opinion *Mario Leggs v. Howard Carlton, Warden*, No. E2005-00136-CCA-R3-HC, 2005 WL 1566546 (Tenn. Crim. App., at Knoxville, Jul. 6, 2005)); *Antonio L. Sweatt v. State*, No M1999-01300-CCA-R3-PC, 2000 WL 255358, at * 1 (Tenn. Crim. App., at Nashville, March 6, 2000), *perm. app. denied*, (Tenn. Oct. 16, 2000) (stating that issue had previously been addressed in Rule 20 Order *Antonio Sweatt v. State*, No. 02C01-9805-CC-00132, 1998 WL 658273 (Tenn. Crim. App., at Jackson, Sept. 25, 1998), *perm. app. denied*, (Tenn. Mar. 8, 1999)).

If we assume that Petitioner's prior issue was not exactly on point, we point out that even when we address the merits as currently argued, Petitioner is still unsuccessful. Petitioner has also attached his indictment to his petition. Count 1 states that Petitioner and his co-defendants:

> [D]id then and there with force and arms, unlawfully, feloniously, willfully, deliberately, maliciously, premeditatedly, and with malice aforethought commit an assault upon the body of James Earl Ray with a knife, causing bodily injury, with the intent to then and there unlawfully, feloniously, willfully, deliberately, maliciously, premeditatedly, and with malice aforethought, to kill and murder him, the said James Earl Ray, and to commit murder in the first degree.

While it is true that Petitioner was indicted for violating subsection (a); Subsection (b) is not a separate way to commit the crime, but instead provides for a different punishment if bodily injury results from the attack. The indictment states that Petitioner and his co-defendants caused bodily injury to the victim. Therefore, it is clear from the language of the indictment that subsection (b) is the appropriate subsection upon which the trial court was to rely for punishment.

Therefore, we affirm the habeas corpus court's dismissal of the petition.

Conclusion

The trial court was correct in dismissing the petition for writ of habeas corpus. Rule 20 of the Rules of the Court of Criminal Appeals provides:

> The Court, with the concurrence of all judges participating in the case, when an opinion would have no precedential value, may affirm the judgment or action of the trial court by memorandum opinion rather than by formal opinion, when:
>
> > (1)(a) The judgment is rendered or the action taken in a proceeding before the trial judge without a jury, and such judgment or action is not a determination of guilt, and the evidence does not preponderate against the findings of the trial judge . . . .

We determine that this case meets the criteria of the above-quoted rule and, therefore, we grant the State's motion filed under Rule 20, and we affirm the judgment of the trial court.

JERRY L. SMITH, JUDGE